Supreme Court, U.S.
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No. 99-2047

In the
Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Palazzolo respectfully files this reply to the Opposition to Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Ignoring the longstanding principle that this Court "do[es] not grant a [petition for] certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), Respondents' opposition to the petition consists in large part of a review of the evidence and a discussion of specific facts. *See* Opp. at 1-9. As explained below, this review and this discussion are utterly irrelevant to the Court's consideration of the questions presented.

ARGUMENT

I

THE POST-ENACTMENT PURCHASER QUESTION

The first question presented by Mr. Palazzolo is whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property. The court below answered this question in the affirmative, ruling that a *Lucas*-type "regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." Appendix to Petition for Writ of Certiorari (Pet. App.) at A–14. The court below further ruled that a *Penn Central*-type regulatory takings claim must necessarily fail in this situation as well, because a property owner can have no "reasonable investment-backed expectations" of developing property if, at the time he acquired it, "there were already regulations in place limiting [his] ability to" develop. *Id.* at A–17.

The petition demonstrated how these rulings are fundamentally incompatible with this Court's decision in *Nollan v.*

California Coastal Commission, 483 U.S. 825 (1987); with the decisions of the Ninth Circuit; and with decisions of the New Jersey, Florida, and Colorado courts. *See* Petition for Writ of Certiorari (Pet.) at 7-10. The petition also explained why it is appropriate to resolve the issue in this case. *See id.* at 10-13.

What do Respondents offer in response to these points? Do they offer a competing interpretation of *Nollan*? Do they dispute the existence of a conflict in the lower courts? No, Respondents can only assert that "[t]he question regarding prior regulations is not well presented by these facts," because it is "a 'fact-bound' question." Opp. at 10. This assertion is totally and completely false.

First, it is simply untrue that the first question presented "cannot be reached without becoming bogged down in complicated questions of fact regarding the precise timing, extent and significance of Mr. Palazzolo's involvement in the previously rejected applications." Opp. at 11. There are no complicated questions of fact in this case. Although Mr. Palazzolo litigated the facts below, he readily concedes for purposes of review in this Court that he became the "owner" of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property. Nor would he "have this Court turn a blind eye" to his "personal knowledge . . . of the limited developability of the parcel." Opp. at 12. Again, Mr. Palazzolo is happy to concede that he was, like the prevailing property owners in *Nollan*, "on notice" of the confiscatory regulations. 483 U.S. at 860 (Brennan, J., dissenting).

But resolution of the question presented does not turn on the *existence* of these facts but rather on their *legal relevance*. The Rhode Island Supreme Court below treated these facts as dispositive, ruling that they altered—nay, abolished—his rights under the Takings Clause. By contrast, Mr. Palazzolo argues, like the prevailing property owners in *Nollan* argued, that his "rights [are *not*] altered because [he] acquired the land *well*

after the [government] had begun to implement its policy." *Id.* at 834 n.2 (emphasis added).[1] To decide between these competing positions is to decide a *pure question of law*. So deciding would hardly cause this Court to "become enmeshed in the complications of a voluminous record." Opp. at 12.

Second, the question presented *is* raised on this record. Respondents' assertion to the contrary, *see* Opp. at 12-13, is grounded in the misconception that the judgment below turned on various "peculiarities" in the present case, Opp. at 13. But the court whose judgment is sought to be reviewed simply did not care about any of the so-called peculiarities mentioned by Respondents. It was solely the fact that Mr. Palazzolo "became the owner of the property *after* the regulation became effective," Pet. App. at A–15, that led the lower court to rule that his regulatory takings claims were categorically barred. *That* fact —a post-enactment purchase—is obviously not peculiar to the present case. *See, e.g.*, Pet. at 6, 9-10 (citing cases where the owner purchased property after enactment of the regulation).

Third, the facts of this case are not "quirky and unique." Opp. at 14. Those adjectives, along with "idiosyncratic," *id.*, are just synonyms for "peculiar."

Fourth, the supposed "alternative ground for affirmance" suggested by Respondents would *not* make a ruling on the first question presented "non-dispositive and advisory." Opp. at 14. Crucially, this "alternative ground"—that Mr. Palazzolo's takings claims are "time-barred," or "well outside of any possible limitations period," Opp. at 15—is a *state-law issue that was*

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[1] This is the very same argument that Mr. Palazzolo advanced in the lower courts. *See, e.g.*, Pet. App. at A–15 ("Palazzolo argued that if in fact he became deprived of all beneficial use of the land, then under *Lucas* it is irrelevant *when* he became owner of the property. Under his reasoning, if a regulation deprives an owner of all beneficial use, it is immaterial whether the regulation predates the claimant's ownership of the land.").

not addressed by the courts below. But it is elementary that where, as here, a state-court judgment rests squarely on federal grounds, the fact that the state court "might have, but did not, invoke state law does not foreclose jurisdiction" in this Court. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In other words, the mere "possibility that the state court might have reached the same [result] if it had decided the [case] purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973).

Nor does the possibility that a state court might, after reversal and remand from the Court, reach the same result but on different (state-law) grounds render this Court's ruling "non-dispositive and advisory." The possibility of such an outcome exists in many cases, and the Court has explicitly recognized the possibility without being troubled by it. *See, e.g., California v. Ramos*, 463 U.S. 992, 997 n.7 (1983) (overturning the state supreme court's reversal of a death sentence on federal constitutional grounds but noting that "[o]f course, on remand from this Court, the state court is free to determine whether as a matter of state law this evidentiary error is a sufficient basis for reversing the death sentence").[2] Indeed, when this Court reversed the South Carolina Supreme Court's ruling in favor of the government in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992), the Court explicitly contemplated that the government could still "win its case" on nuisance-law grounds. But that issue was "one of state law to be dealt with on remand." *Id.* Although *Lucas* provoked vigorous dissents on the merits, not one Justice was concerned that the Court's opinion might, in these circumstances, be thought "advisory."

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[2] On remand, the California Supreme Court did in fact reinstate its original judgment, this time relying on state law, *People v. Ramos*, 689 P.2d 430 (1984), and this Court denied the government's second petition for certiorari, *California v. Ramos*, 471 U.S. 1119 (1985).

In sum, none of the four reasons offered by Respondents is a legitimate basis for not considering the first question presented. It is unrefuted that such question is an important and recurring question of takings law on which the lower courts are in conflict with each other and with this Court.

II

THE RIPENESS QUESTION

Respondents assert that this case is not ripe because Mr. Palazzolo "never applied to develop the property in the manner which forms the basis of his claim." Opp. at 16. That assertion is false: ignoring the plain words of the opinions below, Respondents mischaracterize Mr. Palazzolo's takings claims.

Mr. Palazzolo has for many years desired to develop his property as either a single-family subdivision or a recreational beach facility. As Respondents repeatedly point out, however, all but a small portion of the property consists of "marshland," or (after verbal inflation) "inter-tidal estuarine coastal pond salt marsh." Opp. at 1-2. In other words, the property is presently a swamp, completely unsuitable for building permanent structures like homes or a beach club. Accordingly, Mr. Palazzolo repeatedly attempted to satisfy the most obvious prerequisite to developing his property by applying to Respondent Coastal Resources Management Council (or its predecessors) for a permit to fill the swamp. Those applications were denied and, as Mr. Palazzolo testified without contradiction, CRMC staff "informed him that ***any*** proposal involving the filling of wetlands would be denied." Pet. App. at B–5 (emphasis added).

It is precisely these denials that form the "basis," Opp. at 16, for Mr. Palazzolo's takings claims, as both the state courts recognized. The very first sentence of the trial court's opinion records that Mr. Palazzolo "claim[ed] that [CRMC's] *denial of his application to fill approximately 18 acres of wetlands . . .* constitutes an inverse condemnation taking." Pet. App. at B–1 (emphasis added). Likewise, in the very first sentence of its

opinion, the state supreme court recorded the same observation: Mr. Palazzolo "alleg[ed] that the CRMC's *denial of his application to fill eighteen acres of coastal wetlands* constituted a taking." Pet. App. at A–2 (emphasis added). The petition explained carefully why that denial was a "final decision" under this Court's ripeness jurisprudence. *See* Pet. at 15, 18-19 n.5. Respondents offer nothing to discredit that explanation.[3]

III

ECONOMICALLY VIABLE USE QUESTION

The third and final question presented by Mr. Palazzolo is whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero. The state supreme court answered this question in the affirmative, concluding that Mr. Palazzolo had not demonstrated a denial of all economically viable use based solely on evidence that "had he developed the upland portion of the land, its value would have been $200,000" and that "the wetlands would have value in the amount of $157,500 as an open-space gift." Pet. App. at A–12 to –13. The petition explained how this approach was contrary to the approach taken by the Ninth Circuit in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432-34 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Pointing out how lower courts have recognized that "the precise meaning of 'economically viable use of land' is elusive and has not been clarified by [this] Court," *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841

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[3] In this context, Respondents suggest that Mr. Palazzolo ought *first* to have applied to the state Department of Environmental Management for a septic tank permit before applying to Respondent CRMC for a fill permit. *See* Opp. at 18. Not only is this suggestion completely unsupported by any legal authority whatsoever, it is ludicrous on its face. One can imagine the Department's response to such an application: "You want to put septic tanks where? In the middle of a swamp? Perhaps you should first apply for a fill permit."

F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988), the petition urged that the Court grant certiorari to bring a much needed clarification to this important area of takings law.

Respondents challenge none of these points. They do not deny that the Supreme Court of Rhode Island "considered one piece of evidence—and one piece of evidence only" in ruling that Mr. Palazzolo had not suffered a denial of economically viable use. Pet. at 21. They do not deny that the Rhode Island court's approach to this issue simply cannot be reconciled with the Ninth Circuit's approach. They do not deny that the lower courts have recognized the need for clarification of the issue from this Court. Instead, Respondents merely parrot the lower court, gratuitously reiterating that Mr. Palazzolo could situate *one* home on eighteen-plus acres of property, giving that land a nonzero value. *See* Opp. at 20. This response does nothing to blunt the force of Mr. Palazzolo's arguments.[4]

IV

MISCELLANEOUS

Respondents close their Opposition by proffering three "alternative bases of decision" that would assertedly justify a denial of certiorari. Opp. at 19. The first is that Mr. Palazzolo "lacks sufficient expectations with respect to five crucial lots

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[4] Respondents assert, without any citation to the record, that building a single home would allow Mr. Palazzolo to "realize $200,000." Opp. at 19. This assertion insinuates that Mr. Palazzolo could easily have earned a $200,000 *profit* on his decades-long investment in the subject property. But there is simply no evidence in the record to support this insinuation. Indeed, even the lower court's notion that the property could have a *value* of $200,000, *see* Pet. App. at A–12, completely failed to take into account such things as the economic feasibility of developing only a single house, whether Mr. Palazzolo would receive any return on his investment (including all the property taxes he had paid over the years), and whether the rate of that return would be constitutionally reasonable. *See* Pet. at 21.

[that] were not acquired until 1969, after the inter-tidal wetlands Act came into effect." Opp. at 20. But this supposedly "alternative" basis of decision—that the challenged land-use regulation predated Mr. Palazzolo's acquisition of the property—is *precisely the same* basis on which the Supreme Court of Rhode Island actually ruled. *See generally* Section I *supra*.

The two other grounds proffered by Respondents are that development of Mr. Palazzolo's property was forbidden by unspecified state nuisance law and that the State of Rhode Island actually owns the property under the state-law public trust doctrine. *See* Opp. at 20. But these were not "bases of decision" at all: the state supreme court did not even mention these state-law issues, let alone decide the case based on the issues. *See also supra* pp. 3-4 (showing why unaddressed state-law issues do not diminish the propriety or necessity of review).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for writ of certiorari should be granted.

DATED: August, 2000.

Respectfully submitted,

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